ADDITIONAL BRIEF FOR RESPONDENT.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 18.

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THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY, PETITIONER,

vs.

THE UINTA TUNNEL, MINING AND TRANSPORTATION COMPANY, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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The additional brief filed on behalf of the petitioner contains repetitions of some things included in its original brief, but many others which can not be called matters of reply to respondent's brief, and which were either for the first time presented in the oral discussion or in the brief itself.

We disclaim, while thinking our original brief makes the disclaimer unnecessary, any purpose to impute improper feeling or animus on the part of counsel for petitioner toward the Circuit Court of Appeals or its distinguished members, or any intention to present to this court any view or criticism of the decision of the Circuit Court of Appeals in which they do not have sincere belief. But it is manifest that they do not base their criticism of the Circuit Court of Appeals upon the facts which that court made the basis of its decision, and that they do put that court in an attitude of hostility to a decision, the full force and effect of which that court avowedly recognized, and without any repugnancy to which

they rendered their own decision. With these remarks upon this subject, we must pass to what we esteem the weightier matters of the law.

For the first time in the history of this case, at the oral argument herein, counsel for petitioner asserted that the motion to strike, the sustaining of which was complained of by respondent and held to be error by the Circuit Court of Appeals, could be sustained, and was based upon the alleged existence of several conflicting defenses improperly joined as to form of the union. An examination of the motion itself (printed Record, page 72) discloses that no such ground was therein contained. No such ground existed. When the case reached the Circuit Court of Appeals the action of the trial court was not sought to be sustained upon this ground, nor was it alluded to in any manner whatever, as a careful examination of the briefs in that court discloses. When the petition for certiorari was filed, and the brief in support of it in this court, no hint was given of this contention, nor was there in the assignment of errors, and when the brief of petitioner upon the merits was prepared it, too, was equally silent.

Were it true, as it is not, that several inconsistent defenses had been improperly jumbled together in the answer, to take advantage thereof, it was necessary to file an appropriate pleading in the trial court specifically and expressly raising that objection, so that the court might pass upon it, and counsel, in the event the objection was sustained, might reform the pleading by separating the defenses. All a purely formal matter, at no point touching the merits. A failure to take this course, as is universally held in such matters, constituted a waiver thereof. Certainly such a point could not be raised for the first time in this court, in view of the history of the case and the nature of the objection, the briefs, assignments of errors and other evidences of the contention in fact made.

The answer and offers of evidence show that when the petitioner instituted its original proceeding in the District Court of El Paso county, Colorado, the respondent's tunnel had passed through both the Ocean Wave and Little Mary

laims, and had reached a total length of twenty-two hun-red feet. (Printed Record, page 25.) The original plead-ng, or petition for survey, filed in the District Court of El Paso county, proceeded upon the theory and allegations that he respondent was mining ore within the surface bounda-ies of the Ocean Wave and Little Mary lode mining laims, upon veins the property of petitioner. (Printed Record, page 2.) Upon these assertions an order for survey vas obtained. (Printed Record, page 10.) The complaint iled in the District Court, a distinct pleading from the peti-ion for survey, likewise alleged a trespass, consisting of the ining of ores from veins lying within the surface bound-ries of the Ocean Wave and Little Mary lode mining claims, he property of the petitioner. (Printed Record, page 6.) Only when reformed pleadings were filed in the United States Circuit Court, was this theory and claim abandoned, and the claim first made that by operating the tunnel hrough the Little Mary and Ocean Wave claims the re-spondent was invading the rights of the petitioner. Until hen the pleadings were in harmony with the idea that a perfect right had been acquired by the respondent and was being asserted in operating the tunnel through the two lode laims, and that the offense which was charged upon the respondent was not of thus operating its tunnel, nor of hav-ing run it through the claims, but of having made an unlaw-ful invasion of lodes and veins containing mineral within hese claims, the property of the petitioner.

The difference between these positions, these claims, hese causes of action, is at once apparent. If it were true hat the respondent had utilized its tunnel for the purpose of obtaining access to lodes and veins which were not its property, but which were owned by the petitioner, and was mining and converting it to its own use ore therefrom, these acts would in no wise be justified by any right which had been acquired by the respondent through the location of its tunnel site. On the other hand, if the tunnel location had been made before any valid, in fact, any location of any nature, of the lode claims, there had thereby been acquired a right to run the tunnel, superior to any location which

could be made by the lode claimants, and this right would be a perfect legal justification for extending the tunnel through these claims, and of operating through the tunnell thus extended.

The answer alleges that the tunnel had been run 2,200 feet from its portal one year before suit was brought, which carried the completion of this portion of the tunnell to June, 1896. It was further alleged that the plaintiff therein, the petitioner here, had permitted this to be done without objection, etc. (Printed Record, page 25.) It is now claimed, in the brief of counsel for respondent just filed, that it is alleged in the answer that no objection was made until after the Uinta tunnel veins, numbers 23, 24, 25 and 26 were discovered, and that then, and because of these discoveries, objection was made, and that this can not in fact be true, since the suit was brought in June, 1897, and the veins were discovered in December, 1897, and January, 1898, as alleged in the answer. It is true that in alleging the formal legal discovery of these veins, the dates are given as stated by counsel for petitioner; but it is also alleged that the tunnel had been run a distance which necessarily and actually cut these veins a year before the suit was instituted.

It is to be borne in mind, in this connection, that when the tunnel thus penetrated the mountain and cut the veins, no objection whatever had been or was made to the running of the tunnel; that about a year later the objection was made. It was thereafter, as the record indicates, that the respondent determined to make a formal location of the veins thus cut, by means of surface staking, such as is referred to in Campbell vs. Ellett, 167 U. S., 118, and in Enterprise Co. vs. Rico-Aspen Co., 167 U. S., 116.

There are two so designated discoveries known and recognized in mining law and in common parlance with reference thereto, and also in pleadings and discussion of the subject generally, one the actual finding, the physical ascertainment of the existence, which is a discovery, the other the legal discovery of a date selected as the beginning of the location of the claim which is the discovery of the claim. Mr. Morri-

son has indicated this distinction and double use of the word, in work on Mining Rights, 11 Ed., page 31.

> "The discoverer in law is not necessarily the original finder, but any one who, knowing of the existence of the mineral, takes some step toward an appropriation of the land which contains it. Nevada Co. vs. Home Co., 98 Fed., 673; Jupiter Co. vs. Bodie Co., 4 M. R., 411."

In the answer the allegation is that the tunnel had penetrated these veins, had reached the distance referred to, before any objection was made and before the suit was instituted (Printed Record, page 25), and the allegations are not of the character stated in the additional brief filed herein by counsel for petitioner. Were his contention true it could not answer the claim of estoppel, nor render inapplicable the authorities cited in our original brief. It would be in the line of removing an apparent and appreciable motive for the change of attitude, but would not negative the allegation or change or minimize the wrong.

There was introduced in evidence at the trial below no record or purported or alleged record of proceedings in the land office, and there is no allegation in the pleadings and no proof in the case, to the effect that the land office proceeded upon the theory that the discovery had been made upon the second day of January, 1892, or at any time prior to the entry itself. Counsel assert in their brief that in the issuance of the patent government officials proceeded upon the theory that a discovery had been made on the second day of January, 1892. This claim, assertion, or argument, whichever it may be, is utterly without support in the pleadings, in the proof, in fact, or in the law.

While it may be claimed to be assumed, for the purposes of making an entry and issuing a patent upon a lode mining claim, that the law requiring a discovery within its boundaries has been complied with, and that a discovery has, when the entry is allowed, in fact been made, it is unnecessary that this discovery should be made as of a date asserted

in a location certificate, or at any particular time earlier than the date of the ascertainment of this fact in the land office, which may be as late as the entry itself. This is an ingenious attempt to fortify the falling and disproved claim that a location certificate, the ex parte act of the claimant himself, imports verity and establishes beyond controversy the existence of a discovery at any time the claimant may choose to have the certificate dated by the claim that the land office or the interior department investigating, or presumptively investigating this question, had found as a basis for the issuance of the patent, that the discovery had then been made. There is no such presumption. The department makes no such investigation. The determination and the making of it is wholly unnecessary to the making of the entry and the issuance of the patent. We have in our original brief discussed this matter, at page 34, and call attention to additional authorities as follows:

Morrison's Mining Rights (10th Ed.), page 29, and cases cited.

Lindley on Mines, Vol. 1, page 454, and note.

Smith vs. Newell, 86 Fed., 56.

It was expressly, in answer to a query from a member of this court, conceded in the oral argument, and in the additional brief filed, that a tunnel site could not be patented, although it is a valid appropriation, under permission of law, of rights upon the public domain, entitled to the protection of the law. This admission, we maintain, fully sustains our position, that since no formal grant, as by patent, is issued, and the tunnel site location is a valid and vested property right, perfect, complete and unassailable when and so long as the law is complied with, that whoever assails it, whether by virtue of a patent issued in a proceeding to which it is not a party, or by virtue of alleged prior location of a claim, when these controversies reach the court, each party thereto is free, by a proper pleading and competent evidence, to establish their respective priorities, and to attack mutually the pretences or claims, allegations and contentions of the oppo-

nent with reference to the dates to which it undertakes to attach the origin of its rights. The whole system of adverse proceedings in the land office, and in suits in court dependent thereon, is the creature of statute. Without the statute no such right existed, either to obtain title or to have a determination of conflictig claims. The statute provides only for the determination in this method of conflicting surface claims between those who assert title to the same area, and each of whom has a right, when the other applies for patent, not only to contest that application, but to make its own application therefor. All the authorities cited by petitioner and respondent, with reference to the subject of adverses, proceed upon the assumption, or else precisely decide, that adverse proceedings are intended to and only apply to surface conflicts. But there is in this connection a provision in the statute with reference thereto which is conclusive upon this subject, as is also the failure of the statute to provide for an adverse on behalf of a tunnel site location, or an application on its behalf for patent. In Revised Statutes of the United States, after providing for the filing of an adverse claim and defining the nature thereof, section 2326 contains the following:

> "* * * It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, to-

> gether with the proper fees, whereupon the whole proceeding and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. * * *."

In effect, the provision concerning adverses is intended to cover only those who have adverse claims to the surface of the same territory, and who are entitled to a patent therefor in the event their title is in the proceeding superior to that of the contestant, and are expressly by this section authorized to proceed to a patent, paying so much per acre for the land, without taking further proceedings than by presenting a copy of the judgment roll in the land office. This can not be done with reference to a tunnel site location. The statute is utterly inapplicable thereto; and in this provision we find a confirmation of our theory, manifest from a reading of all the statutes upon the subject, that not only is the tunnel site without opportunity to obtain a patent for the rights to which it is entitled as a tunnel site, but that it is not required to make an adverse, and that the making of adverses is left to those only who have the same character of claim to the surface of the same property. The provision of section 2325 U. S. Rev. Stat. plainly asserts the same doctrine. It says: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner. * * *" See, also, section 2326.

With reference to the title to tunnel site locations a condition exists which is not peculiar. The government has granted many valuable rights to those who shall comply with its statutes, without making provision for the issuance of a patent, the making of a purchase or the taking of proceedings in the interior department or in the courts, for the purpose of ascertaining, with reference to conflicts concerning the same, who has the better right. This has never raised any doubt as to the completeness of the grant, as to the absolute withdrawal of the rights thus obtained and appropriated from

the public domain, or to their protection in the courts by appropriate proceedings against all who seek to invade or challenge them. Among the prominent instances of this kind, in addition to those to which we have called attention in our original brief (page 39), we cite the statute giving a right of way to railroads over public lands.

Act of March 3, 1875.

18 Stat. at L., page 482.

Here a valuable right of way is given. A map is filed, which is approved in the interior department. It contains a provision for forfeiture, in the event that any given section of the railway shall not be completed within five years. This court has again and again sustained the validity of these rights, although the holder thereof has only the approval of his plat to establish the same, and has no right, under any statute, to have a determination of conflicting rights thereto, and gets no deed or patent therefor. Not only this, but where rights have been granted over the same land to others, and a conflict has arisen in the courts between the contestants, the right has been fully sustained.

M., K. & T. Ry. Co. vs. K. P. Ry. Co., 97 U. S., 491.

U. S. vs. Southern Pac. Ry. Co., 146 U. S., 593.

Noble vs. Union River Logging and Ry. Co., 147 U. S., 165.

U. S. vs. Southern Pacific Ry. Co., 62 Fed., 535.

Southern Pac. Ry. Co. vs. U. S., 168 U. S., 45.

Southern Pac. Ry. Co. vs. Groeck et al., 31 C. C. A., 334.

Northern Pac. Ry. Co. vs. Musser Saunitry Land, Logging and M. Co., 68 Fed., 993.

Galliher vs. Cadwell, 145 U. S., 368.

St. Paul, etc., vs. Winona, etc., R. R. Co., 112 U. S., 720.

Like provisions are made for reservoir sites.

Sup. to Rev. Stats., volume 1, pages 626-792 and 945.

Counsel have sought to strengthen their contentions in this case, and their position with reference to the applicability of the Ajax-Calhoun decision hereto, by a reference to the argument made by losing counsel in that case. We have examined the briefs of counsel in that case, and find that counsel who were successful, and who maintained their lode claims against the proffer of the plaintiff in error therein, only contended that the patent was conclusive from the date of the entry shown therein. It was not therein contended, the question was not discussed by counsel on either side, nor the matter presented to this court for its determination, as to the date back of the entry to which and the circumstances under which the patent would relate. It was not contended on behalf of the patentee that his patent would run back to a date of discovery recited in a location certificate, and that this date would be taken to have been conclusively established as against the tunnel site locator, or that relation in that case went, or that it was necessary to have it relate to a date earlier than the entry. The thought of establishing, by a decision of this court, the novel doctrine that the mere recital in a location certificate should be taken as conclusively establishing the date of discovery, and that, too, against one who was given no opportunity to contest the correctness thereof, is repugnant to all the decisions that bear upon this subject, to the spirit of the law and the provisions with reference to the force of a location certificate and the doctrine of relation as applied to patents. It is a common practice, as demonstrated in the various reports of litigation, whether in adverse or otherwise, that discoveries are alleged to have been made of dates much earlier than they were in fact made; alleged to have been made in places where they were never made, and at times when they did not exist. These matters are always left open to evidence, and it many times occurs that a discovery, which, according to the so-called

record in the recorder's office, by the recitals of the location certificate, is many years anterior to the recitals in another certificate of another claim, is in fact junior thereto when it exists at all. In every instance in which the question has arisen, either in adverse suits or in controversies between lode mining claims having apexes to bodies of ore which are found in a vein after the union thereof, or between owners of ditches and other rights, the courts have held that the recital in the location certificate is without effect, and the obligation is upon him who asserts his priority to establish it by competent evidence, and the right exists in his opponent to meet and refute the claim and the evidence introduced for that purpose. The Ajax-Calhoun case is not, and does not purport to be, an exception to this rule. In that case an entry had been made of the lode claims whereby the right to the patent was complete; the government lost all beneficial interest in the title, and that of the entryman was absolute. From that time forward the territory was not public domain; it was not only not unappropriated public domain, but to no extent public domain at all. It had become private property. The permission, therefore, granted by the government to tunnel locators to go upon the unappropriated public domain, did not cover this territory, or give any right whatever to make location of any kind hereon. This had been conclusively determined by all who were interested, or claimed to be interested therein, or had prior to the entry initiated any right which might be in conflict therewith. The rights of the respective parties were exactly as though this territory had always been private land, had never at any time been subject to disposition by the government, or to its permission or invitation to its citizens to enter upon, explore, locate and acquire interests therein. Not only this, but those who had acquired no rights prior to the entry were without standing to assert that by trick or fraudulent device, or by failure to comply with the law, the patent itself had been obtained. They were wholly without privity to the proceedings and the title, and wholly without right to assail in any way, directly or collaterally, the issuance of the patent and the absolute and indefeasible character of the ownership. The government, having by this entry parted with and received pay

for all interests it had held in the land, was powerless thereafter to authorize another to acquire interests therein or to institute proceedings for the purpose of invalidating the title which it had granted. In the case at bar, as poined out in our original brief, as demonstrated by the Circuit Court of Appeals, it was claimed on behalf of the petitioner, and this based wholly upon evidence *dehors* the patent, and not in any sense or to any extent upon land office records, or proceedings, that discoveries had in fact been made on January 2, 1892, although the location certificates were not filed until February 1, 1892. To support the claim of the discovery and of the inception or inauguration of the title and right as of January 2, 1892, the petitioner introduced in evidence location certificates, reciting in the notation below the signature of the parties that the discovery had been made upon January 2, 1892. There is no statute giving any force or effect, probative or determinative, conclusive or prima facie, to this recital in the certificate. There is no means of compelling the same to be truthfully made. There is nothing to protect the date against the cupidity of the locator, and a desire upon his part, by this ex parte and self-serving act upon the record, at least to create a priority over some one who has rights which are in fact prior and superior to his own. A broad invitation to the commission of fraud, a wide door, a splendid opportunity for the perpetration thereof, would be at once opened and given, by the establishment of the doctrine that any weight or force or validity was given thereto, or that it was aught else than a declaration in one's own behalf. Take the present case by way of illustration. The respondent's grantor had posted, as required by the regulations of the land office made in pursuance of United States Revised Statutes, section 2478, its notice at the portal of its tunnel, thereby inaugurating its right, on the 13th day of January, 1892. On the first of February following the petitioner, or its grantors, filed a location certificate in which a date is given to the alleged discovery, of January 2d. An issue is raised as to whether in fact the discovery was thus made, for if not, then no rights existed whatever to the territory occupied by the tunnel, in behalf of the lode claim-

ants against the tunnelsite locators. The tunnelsite locators claimed that no location had been made, no discovery had been made, at the time their tunnelsite was located on January 13, 1892, and that the territory covered thereby was unappropriated open public domain, upon which they had a right to go, and upon which, having gone, instantly a vested right was created, which could be taken from them only through due process of law. They claimed that on that day the tunnelsite locator secured, under the tunnelsite statutes and regulations, vested rights to the full extent provided by law, and ever afterwards fully maintained them. At this time, and certainly on January 13, 1892, no discovery having in fact been made upon the Ocean Wave and Little Mary claims, the government had not parted, by any character of act or adjudication, with all or any of its title in the premises, and had not put the property beyond the right of its citizens to avail themselves of the invitation of the mining statutes, including the tunnelsite statute, to enter upon and appropriate the same. After the location of the tunnelsite, the location certificates of the Ocean Wave and Little Mary were filed, with what we claim to be their false assertions as to the date of discovery. At any rate it must be said that this date is disputed; and if it be in fact untrue, as the respondent pleaded and offered to prove, and as must be taken to be the fact in this discussion, in determining the effect of this claim, then the petitioner had no rights of any kind in the ground in dispute, when the respondent secured its rights, and could never thereafter, as against the respondent's title, have any, because the latter complied with the law and maintained the priority and superiority of its location. There has never been an adjudication involving this question between these parties. The rights of the tunnelsite locator, the respondent, have never been passed upon, and upon the assertion of its pleadings remain paramount. Upon the allegations of the pleadings, and without any adjudication to the contrary by any competent tribunal, the respondent stands in the attitude of having located and become entitled to the rights it asserts, and as it alleged and offered to prove, to have withdrawn them from the public domain, appropriated them, ac-

quired vested rights in them and made them private property, and while no patent, deed or other conveyance is by law provided for, and no conveyance was or could be received, this left the grant by the government, the right thereto of the respondent, as perfect, as fully vested, as if it had received a patent therefor. The property claimed by the respondent, and to the extent covered by its location, having been thus withdrawn from the public domain authorized to be appropriated, was therefore no longer subject to grant by the government nor to location or acquisition by the petitioner or its grantors. No acts of the government or of the petitioner could thereafter divest the respondent of its rights. The adjudication of the interior department could not destroy them, for to them the respondent was not a party, and of its rights there was no jurisdiction, nor was there of the person of the locator, and the government could not grant again that which it had already conveyed, and which had thereby ceased to be public domain. While the case was one in which there was a contest between a placer and a lode claim, the decision of this court in Noyes vs. Mantle, 127 U. S., in harmony with other decisions, has settled the general principle for which we contend, and which is in no sense limited to placer claims, but is necessarily universal in its application. The court say, speaking of the claims which had been located prior to the location of the placer:

> "There is no pretense in this case that the original locators did not comply with all the requirements of the law. * * * They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. * * * The ground itself was not afterwards open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. * * * As said in Belk vs. Meagher, 104 U. S., 279, 283: 'A mining claim perfected under the law is property in the highest

sense of that term, which may be bought, sold and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government. * * * *A patent of the government can not, any more than a deed of an individual, transfer what the grantor does not possess.*"

Here the grant was simply the legal result of a compliance with the statutes.

The reasoning herein is exactly applicable to the case we are considering. The tunnel site could never get a patent, and therefore had perfected its title to a degree which had not been done by the lode claimants, who might, at their option, have proceeded to obtain a patent upon their premises. The tunnel site was properly located in accordance with law, and by the grant of the statute fully vested, and was property to the extent and for the reasons stated in Belk vs. Meagher, cited *supra*, and being thus vested, thus granted, the government could not grant it again by a patent to the petitioner.

Among the well-known limitations upon the effect and force of patents, and their unassailable nature, is that they can not grant what has been by the government already granted, and so far as they attempt or purport so to do they are void, and their void nature may be shown in any proceeding at law or in equity in which the controversy arises.

St. Louis Smelting and Refining Company vs. Kemp, 104 U. S., 636-657, cited by complainants, and a quotation from which was much dwelt upon in the oral argument, thus states the law in the opinion delivered by Mr. Justice Field:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress

had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

* * * * * * *

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, *or had been previously transferred to others.*"

In the case at bar, when the respondent acted upon the authorization and grant of the law, and in conformity therewith, the territory to which its rights attached was transferred to it by operation of law, under the statute; was withdrawn from conveyance to another, and the department and the government were wholly without jurisdiction to convey or patent it to another. The facts disclosing this condition may be shown, and so this court announced in the quotation, supra, and in other cases.

Can it be maintained that the government has discharged its duty to the tunnel site locator, who has invested his thousands and hundreds of thousands in reliance upon the good faith of the government and the validity of the grant made by the federal statute, while excluding him from

the formal acquisition of title, by a patent excluding him from a contest in the land office, permitting a patent to go as to him ex parte, and then making that patent conclusive against him, in behalf of one with whom he has never been permitted to wage his controversy, and who is, by a false recital in an ex parte document, permitted to destroy that which else was of great value, and fully justified the large outlays the government had induced him to make upon it? It would seem that the petitioner, having, without discovery, obtained a patent from the government in this case, as the alleged facts show, ought to be content to take that title, unassailed and unassailable to the extent the government had the right to give it, without seeking to give it an unreal and fraudulent date, for the purpose of taking away the use of the tunnel, which use in no way conflicts with the exercise of its dominion over anything which it was open to it, to acquire when it started its location, but which, when taken from the tunnel site locator, utterly destroys the value of the tunnel in all its parts, and makes waste of the large expenditures made upon it.

The real legal question presented is, when stripped of all extraneous matters and brought down to its logical and simplest features, did the petitioner, by getting a patent, take from a prior tunnelsite locator the rights which were in existence at the time when the petitioner in fact initiated his location? May special tribunals, of limited and peculiar jurisdiction, confined to definite subjects and to parties occupying definite relations thereto, determine rights of parties who are not and could not come before it, over titles with which they have no concern whatever? May a valid judgment be rendered by a tribunal never vested with jurisdiction of the subject-matter or of the parties? The more the question is studied and investigated, the more clearly it will become apparent that unless the petitioner can establish conclusively, as determinative of our rights, the ex parte judgment in the proceedings in which it applied for patent, it can in no way prevent an investigation of the truth, upon competent evidence under legitimate pleadings in this case. If the patent is absolutely conclusive, if it cut off and termi-

nated our rights forever, then why any necessity for the petitioner to allege and resort to the discovery recited in the location certificate? If, however, the necessity for this allegation and resort exists, since no law or decree has established the sanctity of the location certificate or made it invulnerable to attack, but one result can legitimately follow, and that is to permit a proper judicial examination into the controversy.

It is correctly announced, by opposing counsel, that a lode claim, when legally located, gives title to the claim as fully as does the patent, and that it is optional with the locator to retain his unpatented claim, or patent it. An advantage of the patent is that annual labor is no longer required, and conflicting surface claims are ascertained and determined by the adverse proceedings, which are incident to the patent application.

U. S. Revised Statutes, sections 2325, 2326.

It is also equally true that a tunnel site location, validly made and maintained in conformity with the law and regulations of the department concerning the same, gives, as to the bore of the tunnel and the right of way therefor, and potentially for all lodes subject to its location as they are cut and disclosed in the tunnel, all the rights incident and appurtenant to and a part of tunnelsite locations, as fully as does the lode claim location to the rights of that character of claim. The difference between the two characters of location is that the lode claimant, at his option, may obtain a patent for such rights as his location covers, while the tunnelsite locator can not do so. The rights of each are vested, protected by law, and constitute grants irrevocable in their character. If a controversy should arise between them, each is at liberty to establish, by proof, the initiation of his right, and, whichever is first in the legal, valid inception of his claim, will, to the extent of any conflict between them, each having maintained his claim by a compliance with other provisions of the law, prevail. One having the privilege, the option, to patent if he will, the other having no such right,

the first obtains his patent; he, if he came last upon the ground and initiated his right later than the other, there being no conflict upon that point, takes his location subject to, but not destroyed, not invalidated, by the prior tunnelsite location. The lode claimant, for illustration, concedes this condition of interests. He does not assert any hostile, or adverse, right to that maintained by the tunnelsite locator, and the government, only having power and jurisdiction to patent that with which it has not parted, which has not been acquired by the tunnelsite locator, issues the patent to the lode claimant. There has been, under these circumstances, no occasion for an adverse proceeding; there is no surface conflict; the statute by the terms of which only an adverse can be filed, has neither authorized, required or permitted the tunnelsite locator to institute such an adverse. The rule in such cases is that the law excepts, excludes, the prior grant from the patent, and this whether there be formal exception or not, in the language of the patent, and even when the grant in the patent has been expressly made of this excluded right.

Morrison's Mining Rights (11th Ed.), page 134.
Deffeback vs. Hawke, 115 U. S., 392.
Davis vs. Weibold, 139 U. S., 527.

The exclusion or inclusion, by the officials issuing the patent, of this particular right therein is of no legal effect. What other course by law could have been taken, had it been the purpose of the lode claimant to assert a title hostile to the tunnel location? Or, if the tunnel locator had desired to contest the question and have it adjudicated in the patent proceedings? Neither had the power to use that proceeding for that purpose. The law did not permit it. The patent can neither loose nor bind as to the prior rights of the tunnel site. The patent and the patent proceedings, therefore, left the parties free to proceed by the usual, full and adequate remedies at law and in equity, to litigate any differences which might exist between them. It is true, and will be conceded, that even if no patent had ever been applied for by the lode claimant, an action like this action

might be brought, and the whole question of their controversy therein fully determined. It does not follow that because the patent does not cover and conclude all controversies, that titles are left in open and defenseless condition, and subject at remote times to attack by a character of evidence precarious and unreliable. The litigation need not wait. Trespass, ejectment, injunction, are all ready at command, and are as fully competent to a just determination of the issues as the adverse proceeding, which ultimately falls back upon the courts on these very remedies. No one, then, need wait, even as long as is necessary to get a patent, to settle all matters affecting his title in conflict with a tunnel-site location. This is what, and all, we contend for. While the petitioner takes a position which is the very incarnation of injustice, and which violates every maxim of the law of every system of jurisprudence known to civilized nations. Strike, but hear first, was the ringing challenge to an attempt, under the Roman law, to dispose of rights without a hearing—without what we would term due process of law. This principle is older than our Constitution, than the Bill of Rights, than Magna Charta. It has its origin deep down in an inherent sense of justice, which lies at the bottom of the institutions of all nations having even the slightest regard for the frailest morality. Would it be justice to close the doors of a court in our face, to exclude us from participation in the proceedings, to tie our hands and close our lips, and then bind us by the decree, and under it strip us unheard of valuable property? And yet this is exactly what is attempted to be done, and all for what reason, for what purpose? Is any great public policy to be fostered by this sacrifice of right? None. All policies which should be encouraged can be done so as signally if a trial be had and justice then done. No plausibility of argument, no ingenious suggestion, no endless repetition of the tracing of a logical circle, no theory of assumption, can give the seeming of right to the suggested course for which petitioner contends. Our position protects all rights, hears all parties fairly, and justly passes upon the contentions of all who are interested.

It is claimed correctly by counsel for petitioner that while a discovery is necessary to a location, and this is pro-

vided by the express terms of the United States statutes, and has been so decided by this court and other courts repeatedly, that if in fact the other acts which should follow the discovery are done first, and thereafter the discovery is made, the location is valid. In other words, that discovery may be made after other acts of location, which usually follow it. There is some dispute upon this subject, but we are quite willing in this argument to concede this contention. The question then arises, when does the location begin? When are the rights of the locator inaugurated or initiated? Do they go back to the acts of location which were done before the discovery, or do they all take their date as of the discovery itself?

Mr. Morrison, in his Mining Rights, 11th edition, page 32, upon this subject says:

> "If a location be made before discovery, but is followed by a discovery in the discovery shaft, *before any adverse rights intervene*, such subsequent discovery cures the original defect, and the claim is valid. McGinnis vs. Egbert, 15 M. R., 329; Golden Terra Cotta Co. vs. Mahler, 4 M. R., 390; Jupiter Co. vs. Bodie Co., 4 M. R., 411; Zollars vs. Evans, 4 M. R., 407; North Noonday Co. vs. Orient Co., 9 M. R., 529; Erwin vs. Perego, 93 Fed., 608; Nevada Co. vs. Home Co., 98 Fed., 673; Brewster vs. Shoemaker, 63 Pac., 309; and the land department has followed these rulings. 28 L. D., 526.
>
> "But where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location. Beals vs. Cone, 62 Pac., 948."

The last case cited is also reported in 27th Colorado, 473. An extract therefrom is pertinent to this discussion. (Page 484):

> "The trial court excluded appellant's original certificate of location on the Tecumseh, which bore

date May 3, 1892; was recorded May 6, of the same year, and claimed a discovery on April 18, preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Section 2320, U. S. Rev. Stats. *Until such discovery no rights are acquired by location.* The other requisites which must be observed in order to perfect and keep alive a valid location, are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location, *but not so with discovery;* for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. N. Noonday M. C. vs. Orient M. C., 6 Sawyer, 299."

This case, in which the distinguished counsel for the petitioner succeeded in the Supreme Court of Colorado, was brought upon writ of error to this court, but jurisdiction declined for reasons stated in the opinion therein.

Beals vs. Cone, 188 U. S., 184.

When such important rights are to attach to the date of discovery, the date relied upon should be a true one, and it must be established, when it is to take effect against another,

in a proceeding to which he is a party. This is but to state an axiom of the law.

Lindley on Mines, sections 335, 337.

Upon this subject Mr. Morrison, in his Mining Rights, 11th Edition, at page 30, says:

> "The fact of discovery must be proved by the party alleging it as the inception of his possessory right."

Sands vs. Cruikshank, 87 N. W.. 589.

> "Where a location is made without a discovery the land remains public domain until there be a discovery."

Tuolumne Co. vs. Maier, 66 Pac., 863.

One who seeks to base a right upon the existence of a fact, must prove that fact, and if that fact is necessary to the inception of his right, the right of course can not exist until the fact exist, and the proof of the right is therefore dependent upon the establishment by competent evidence of the act itself.

The public domain can not be vested in an individual by his doing some of the acts required by the government, while at the same time the essential and important act is omitted. Discovery is the basis of all lode claim rights. Until the discovery is made, the territory remains public domain. Being public domain, the pretended locator, he who has attempted to make a location, but has done so without complying with the fundamental requisites of the law, acquires no rights thereunder. He leaves the land exactly of the nature it was before he made his futile attempts. He can not call that a location which is lacking in the very essence of a location. He can not give to other acts the force and validity which by that statute is confined to a discovery. He is not permitted to substitute something else for the discovery.

Sands vs. Cruikshank, 87 N. W., 588, is a case in which the court took up the question, as was done in Cone vs. Beals,

of the necessity of a discovery as the basis of the right. The court say:

"Defendant's title to the ground in dispute rests upon an alleged location initiated January 1, 1886. The plaintiff's title depends upon an alleged lode location initiated September 9, 1891. As we read the record and understand the arguments of counsel, the only real controversy in this court relates to the sufficiency of the evidence to establish an actual discovery by defendants prior to the location of the plaintiff's claim. Assuming that defendants proved performance of the other acts necessary to the acquisition and continuance of their title, and that the plaintiff proved performance of all the acts required to make and maintain a valid location on his part, if the defendants made a discovery, within the meaning of the statute, the ground in controversy was not unappropriated lands of the government when the plaintiff's claim was initiated, and his location was void. 1 Lindley on Mines, 337. If, on the other hand, the defendants failed to prove an actual discovery prior to the intervening of the plaintiff's right, they can not complain of the judgment redered by the trial court. 'A location can rest only upon an actual discovery of the vein or lode. Such discovery must precede the location, or be in advance of the intervening rights.' Lindl., Mine, Sec. 335. Upon this branch of the case the trial judge found as follows: 'That on the first day of January, A. D. 1886, Alexander Cruikshank, one of the defendants, and one J. C. Shurtz, made a pretended location of a mining location called the Stewart lode or mining claim. That said location was attempted to be made by posting a notice at or near some work that had been done and performed some years prior thereto upon a mining location known as and called the Lilly lode or mining claim; but at the time of the pretended location of said Stewart lode or mining claim, the said pretended locators thereof made no discovery of any vein, lode, or ledge

of rock in place bearing valuable mineral, nor did they at any time make such discovery prior to the location of the Big Foot lode by Martin Sands and Gregory Cruikshank on the 20th day of September, 1891.'"

The court therefore found that the territory had remained public domain, notwithstanding certain acts of location had been done because the discovery had not in fact been made.

In Tuolumne Con. Mining Co. v. Maier, 66 Pac., 863, the Supreme Court of California in a controversy between a mining claim and a right of way for a ditch over the territory within the claim, rendered an opinion in which they held:

> "As to the other finding, we think the evidence fails to show that the Buena Vista mine was 'duly located,' as against plaintiff's right to maintain his ditch, for the reason that there is no evidence of any discovery of minerals until after plaintiff's right to maintain his ditch thereon had attached. We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon. Erhardt vs. Boaro, 113 U. S., 535, 5 Sup. Ct. 560, 28 L. Ed., 1113; O'Reilly vs. Campbell, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed., 669. And, for the purposes of this case, it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may here be conceded that a previous location may be made valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery." * * * * * *

We have quoted extracts from the last three cases cited, not because they are the only cases, or the chief cases, thus holding, but because they are recent decisions of courts in states where the questions are familiar, where courts and counsel are frequently brought in contact with these questions, and they exhibit what has come to be the accepted

interpretation of the federal statutes and the decisions upon these subjects, and are in perfect accord with the decision of the Circuit Court of Appeals in this case.

Counsel, in their opening brief, made a spirited and positive contention that the Circuit Court of Appeals had misquoted, misapprehended and misunderstood the record in this case, and the allegations of the answer upon the subject of whether there had been, in fact, a discovery within the Ocean Wave and Little Mary claims prior to the location of the tunnel site. We thought all controversy on that subject had been removed from this discussion when we cited extracts from the opinion of the Circuit Court of Appeals, from the brief of opposing counsel, and from the record upon that subject at pages 12-15 of our brief. Counsel, however, cling tenaciously to this contention for the reasons, we think, to which we invited attention in our original brief. They now, however, shift their ground, and instead of maintaining that the answer did not deny the making of a discovery before the location of the tunnel site, and did not, in the affirmative matter therein contained, assert that such a discovery was made long after the location of the tunnel site, indulge in an elaborate discussion of the meaning of "pretended" when applied to the discovery and the location. This is found at page 3 of their printed brief, and interprets the answer to give date to the pretense and not to the discovery.

The present claim would be amusing if it were not seriously presented in a grave controversy. No claim of this kind was made in the Circuit Court or Circuit Court of Appeals, although respondent, in his brief and at the trial by its allegations, and its offers of evidence, called attention to the claim that no discovery had been made upon or in the lode claim when the tunnel site was located, nor until long thereafter. (Printed Record, pages 20, 37, 86; Brief, page 6.) Counsel responded that this could not be inquired into, not that the answer did not properly raise the question. The position then was that the patent precluded inquiry, and for that reason the pleading was stricken and the evidence rejected. Now we are told in a contention, how earnest we will not suggest, that we have alleged that the *pretence* of the discovery was made after our location, and not that our

location was made at the time when there was no discovery or before the discovery upon which the petitioner relies. This distinction is certainly refined, acute and ingenious, but hardly need we add baseless, not even plausible, much less sound. The use of the word pretended, which means, as the courts have held and the statute and decisions have announced, "asserted," "*claimed*" without recognition of the correctness of the claim, and has been here employed as it is employed every day in pleadings, without criticism of any sort, without any excuse for the claim presented and urged by opposing counsel, that the allegation is to be applied to the time when the pretence was made, and not to the date when the pretended discovery was, in fact, made. The respondent employed the usual and recognized form of allegation in such matters, and what is said is, in effect that the alleged and pretended discoveries upon which the claims were based were made long after the location of the tunnel site, and that the lode claimants, at the time they pretended and claimed to have made their location, knew this to be the fact, and knew that the tunnel site had been located, and therefore made their alleged location subject thereto.

We have as early as the 32d of Henry the Eighth, a statute known as the "*Pretensed Title Statute*," which provides that no one shall sell or purchase any *pretended* right or title to land unless the vendor has received the profits thereof for one whole year before such grant, or has been in actual possession of the land, or the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. 4 Broom & H. Comm., 150.

We have also the expression of "*false pretenses*," in which the thing pretended is known to be false, and employed for the purposes of fraud.

Wharton's Criminal Law, sections 1130, 1175, 1186, 1189.

Broom's Common Law, 963.

Commonwealth vs. Drew, 9 Pick., 184-6.

In Chitty, and other standard works, on pleadings, we find the expression alleged grievance, or the pretended deed employed where parties are attacking a claim, and do not wish to concede the existence of the questioned fact.

In Webster's Unabridged Dictionary, title "Pretend," we find the following definition:

> "To put in a claim, truly or falsely; to allege a title; to lay claim, to strive after something; usually with to. 'Countries that pretend to freedom.' Swift."

In this connection it is to be observed, that not only in the answer is there a specific allegation, definitely that the discovery, the alleged or pretended discovery, or whatever it may have been upon which the petitioner based his rights subsequent, in point of time, to the location of the tunnel site, but that, also, there is a denial of any location or discovery. This is certainly a denial of any location or discovery prior to the tunnel location, and the fact that it may be broader than the respondent would be permitted to sustain, by proof, and that it would be limited to proof down to the time when the title passed from the government in the event that it originated ~~his~~ title thereafter, it certainly is the denial of any location down to the entry which is shown to have been more than a year after the location of the tunnel site.

We unite with counsel in the assertion that the question here involved is an important one, but we fail to see how the affirmance of the decision of the Circuit Court of Appeals can produce any dire results, or how it can unsettle titles, or can take away the surface, or can take away lode claims that have been located, since it can only maintain the right in the bore of the tunnel through territory in which it was run, upon location made before any discovery or acquisition of any right in the claims as lode claims was made. Petitioner's contention destroys the whole tunnels, while respondent preserves them, at the same time inflicts no serious injury upon lode claimants and the great public policy announced

in the statute with reference to tunnels is preserved, and the inducement to the development of the hidden resources of the government domain is held out undiminished in its force and attractiveness. This court has united with the Circuit Court of Appeals in announcing and approving this policy.

Enterprise M. Co. vs. Rico-Aspen M. Co., 167 U. S., 108; 66 Fed. Rep., 200.

Counsel seem to think that in some way they have broken the force of our citation of the opinion of the Circuit Court of Appeals in Evans vs. Durango L. & C. Co., 25 C. C. A., 531, by pointing out that Judge Sanborn, while concurring in the decision, dissented in that case on not the rule concerning relation, but its application in that case. It will be found that Judge Sanborn did not dissent from the doctrine, but from its application to the particular facts under consideration. The doctrine, as we contend for it, as shown in the cases we have cited from this court, and upon which opposing counsel make no comment, and the cases from this court cited in that opinion, maintain the same doctrine. We are unable to perceive the force of the allusion to Judge Sanborn's dissent as a means of weakening the logic of his argument in the case at bar. Had Judge Sanborn in that case taken a position diametrically opposed to that maintained by the court, and afterwards had acted upon that opinion in deciding this case, it would leave his opinion unweakened by that fact. It is not our province here to discuss the value of dissenting opinions. We have all noted, especially when they hold with us against a majority opinion which has destroyed our hopes, in our view the great force and vigor with which their reasoning is maintained and the overwhelming learning displayed in them.

But, after all, in this case counsel must either contend that the Circuit Court of Appeals was wrong in the Evans case, in stating the doctrine of relation, which we do not understand to be their position, or else that in some way Judge Sanborn in his dissent took a position which he has not taken in this case, and has thereby weakened the force and

persuasiveness of his argument. As to the force of his reasoning, as to the weight the opinion of that court, in which many mining questions have been considered and determined, shall have here, we shall now say nothing; but we may be permitted in this connection to claim that, even had the course of Judge Sanborn been that we understand to be imputed to him by counsel, it was perfectly proper. It is not for us to even intimate an opinion upon how long or in what manner a dissenting judge shall cling to and seek to maintain and assert a view which was powerless to control the decision of the court. We have often thought that no higher tribute was ever paid to judicial character than is given us by Judge Hopkinson in the portraiture of Bushrod Washington—a portrait unflattering the great merits and qualifications of that learned jurist, in which the eloquent biographer said:

> "He was wise as well as learned; sagacious and searching in the pursuit and discovery of truth, and faithful to it beyond the touch of corruption or the diffidence of fear; he was cautious, considerate and slow in forming a judgment, and steady, but not obstinate, in his adherence to it. No man was more willing to listen to an argument against his opinion, to receive it with candor, or yield to it with more manliness, if it convinced him of the error. He was too honest and too proud to surrender himself to the undue influence of any man, the menace of any power, or the seductions of any interest; but he was tractable as humility to the force of truth; as obedient as filial duty, to the voice of reason. When he gave up an opinion, he did not grudgingly or with reluctant qualifications and saving explanations; it was abandoned at once, and he rejoiced more than anyone at his escape from it. It is only a mind conscious of its strength and governed by the highest principles of integrity, that can make such sacrifices, not only without any feeling of humiliation, but with unaffected satisfaction."

If it should be contended that Judge Sanborn erred in his dissenting opinion, he has not unduly clung thereto, and in his dissent nothing can be found which militates against the clear reasoning of the opinion delivered by him for the court in which all the judges concur.

It can not now be contended that the doctrine of relation is not equitable in its nature, that it should not be confined to the accomplishment of justice rather than to the perpetration of wrong, or the assistance of fraud. It can not now be claimed that it may be invoked to injure the innocent and aid the wrong-doer. Our contention with reference to it, our citation of authorities concerning it and its manner of its application by the Circuit Court of Appeals, all fall within these limits, clearly and universally announced by all the courts as the true rule.

In Campbell vs. Ellett, 167 U. S., 118, and Enterprise M. Co. vs. Rico-Aspen M. Co., in 167 U. S., 108, this court held that a tunnel site location need not adverse the application for patent by a lode claimant. The court in those particular cases pointed out the needlessness thereof, and that no wrong could be done to the lode claimant by failure to require the adverse to be made. Reasoning was given why this was a sound interpretation of the statute. But the court did not limit the rule to the reasoning given, nor to the particular circumstances of that case, but announced a general rule. There is no provision in the statute that in certain cases a tunnel site claimant need not adverse. There is no provision in the statute that under any circumstances or in any case he shall adverse. Without statutory requirement of this nature, it does not exist. To assume that the court was limiting instead of giving reasons to support the rule that an adverse was not necessary or required, and to leave each case open to an investigation years afterwards of whether or not an adverse should have been filed, and to determine upon the peculiar facts of each particular case, resting largely in parole, this question would be to make another decision, to formulate another rule, and to put not only a strained, but a wholly unwarranted interpretation upon the

provisions of the federal statutes upon this subject and upon the decisions. The court has held that the adverse was not required to be made by the statute, has given reasons why, especially in the case before it, this was a just and equitable rule, but the reasons do not limit the rule to that particular case, nor leave any exceptions thereto, for, as good reasons in other cases might be presented as were presented by the court in that, and, in fact, the court announced a general, comprehensive, just and exceptionless rule, which is that the statute has not provided for or required adverse in any cases for a tunnel site location against a lode claim. This does not mean that where the tunnel site locator sees fit to go upon the surface and make a location based upon his underground discovery, that he may not apply for patent therefor and become involved in an adverse location. It does hold that the world being advised of the existence of the tunnel, and of the existence of its rights, go upon the public domain, is restricted in its extent as to what is left by awarding to the tunnel site location all which the statute gives it. Therefore, our response to counsel's interpretation of the cases mentioned is that, since the law has made no provision for adverses in cases of the character now under consideration, that of a tunnel site locator bore of the tunnel, the adverse is not required by statute, is not, therefore, required at all, and there is no power in the courts or the interior department to add to the requirements of the statutes.

It requires no argument to demonstrate that there was no surface conflict between the bore of the tunnel and the lode claimants, but at this later than the "ELEVENTH HOUR," counsel have taken the singular position that the certificate of the tunnel site provides that certain stakings which indicate the line of the tunnel and the limits within which its claims must exist, and that while it does not claim the surface, and acquired no rights thereby to the surface, yet this makes the surface conflict, and requires an adverse to be filed. When the certificate is read, it will be found that it contains no such claims. The singular result would

then be presented of an adverse in behalf of a claim which was never made, which had no existence, and of a party required to go into court and adverse there and have a determination of an unasserted and non-existent conflict.

The object of the stakes upon the surface, in the present case, could not interfere with the right of the lode claims, because they were not then discovered or located, nor at the time when the patent was issued, because, as this court and other courts have held, the stakes may be put upon the surface, as indicating the form or extent of the claim, even though the claimant has proceeded to patent, since no right is asserted to the surface, whatever included within the stakings.

Del Monte vs. Last Chance, 171 U. S., 55.
Morrison's Mining Rights (10th Ed.), 43.

Counsel frankly admitted, upon interrogation, at the oral argument, that, in fact, the location certificate secured no surface rights. We add that we are not now claiming, and have never claimed, such surface rights; that they are not the matters involved in this litigation, and that the rights we are asserting are as to the bore of the tunnel through the Ocean Wave and Little Mary claims, which are in no sense surface in their nature.

In response to our statement that there was no discovery in the Ocean Wave and Little Mary, petitioner replies that in this we are at variance with you, and our location certificate said "Yes." We answered: "But it did not speak truly, and what we now desire is an opportunity to ascertain the truth and very right of the matter. We maintain that you may not thus create a right by a subsequent recitation which is in fact untrue, and then protect this contention by an assertion of the inviolability of patents, and that they are not subject to collateral attack."

The Logan-Stratton case has been referred to (Reply Brief, page 18), and excerpts taken from the opinion of Judge Hallett thereon. The Logan claim had been withdrawn from the public domain before the attempt to run the tunnel. It was claimed that a recent state statute gave

the right to the tunnels to run through prior existing valid lode claims. The court held against this contention. It will be observed from the opinion, and that as held, that the territory had ceased to be public and was not subject to the tunnel rights under the statute, because it had been duly appropriated and withdrawn from the public domain prior to the attempt to assert tunnel rights therein. It is to be noted, however, that Judge Hallett did not hold in that case that a patent could be carried back upon the doctrine of relation to a discovery which was never proved, merely because a location certificate recited its existence.

An examination of counsel's authorities and discussion upon the question of estoppel will, we think, demonstrate the inapplicability of the one, and the failure of the other, to see the true contention we make and the effect of the authorities we cite. We can not now enter into a full discussion of this branch of the case, and feel that what we have done in this way in our original brief makes this unnecessary.

Having just received the brief of counsel in this case, and having, in the former brief and the oral argument, presented generally the main and controlling features upon which we rely, and believing that the Circuit Court of Appeals, in its opinion, has fully sustained, upon authority and reason, the position it took, we, without any further comment upon any of the matters contained in the brief of counsel for petition, with which we do not coincide, submit this case for the determination of the court.

Respectfully submitted,

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